MBF FINANCE BHD

v.

SIM PENG BEE & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 11-26-2001]
21 JANUARY 2003

HIRE PURCHASE: *Hire-purchase agreement - Lorry purchased and hired under agreement - Default in payments - Lorry repossessed and sold - Whether notice required under s. 16(6) of Hire-Purchase Act 1967 - Whether agreement not bound by provisions of Hire-Purchase Act 1967 - Whether onus upon defendants to prove otherwise*

EVIDENCE: *Burden of proof - Onus - Evidence Act 1950, s. 101 - Hire purchase - Whether plaintiff discharged legal burden to prove hire purchase agreement beyond ambit of Hire Purchase Act 1967 - Evidence Act 1950, s. 102 - Whether evidential burden on defendant to rebut plaintiff's assertion - Whether onus discharged*

The first defendant executed a hire-purchase agreement with the plaintiff to enable the first defendant to hire and purchase an Isuzu lorry. The second defendant stood as a guarantor to the said agreement. The defendant defaulted on the payments and the plaintiff repossessed the said vehicle. After deducting the payments made and proceeds of the sale of the repossessed vehicle, the plaintiff sought for the balance sum owing under the agreement. The defendants submitted that as the vehicle was a motor lorry prescribed under the First Schedule to the Hire Purchase Act 1967, the agreement was subject to the Act as well and therefore the plaintiff ought to have complied with s. 16(6) of the Act regarding the service of a notice in the Fifth Schedule thereto. It was argued that the onus was upon the plaintiff to prove that the agreement was not within the ambit of the Act.

The magistrate decided in favour of the defendants. Hence, this appeal.

Held:

[1] The plaintiff had discharged the legal burden cast upon it by virtue of s. 101 of the Evidence Act 1950 by proving prima facie that the lorry was a heavy vehicle not subject to the Act. This being the case, under s. 102 of the Evidence Act the evidential burden shifted to the defendants to prove that to the contrary. However, the defendants neither cross-

examined the plaintiff's witness nor did they did call any witnesses or give evidence themselves. Therefore they ought to be barred from raising this issue in argument. The plaintiff's case therefore remained unrebutted. (pp 696 a-c, f & 697 h)

[2] In light of the registration card which showed that the maximum permissible laden weight of the said vehicle to be 4,100kg which exceeded the 2,540kg limit for goods vehicle listed in para 2(d)of the First Schedule of the Act, the lorry in this appeal was clearly outside the ambit of the Act, in which case the plaintiff had correctly asserted that the Act did not apply to the agreement. (p 698 a-b)

[Appeal allowed with costs.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

Arab Malaysian Credit Bhd v. Har Yoke Ling [1998] 1 LNS 3 HC ***(refd)***

Browne v. Dunn [1893] 6 R67 HL ***(refd)***

Edis v. Bury 108 ER 511 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139 ***(refd)***

Joremi Kimin & Anor v. Tan Sai Hong [2001] 1 CLJ 526 CA ***(refd)***

Kesang Leasing Sdn Bhd v. Mohd Yusof Ismail & Anor [1989] 2 CLJ 1216; [1989] 1 CLJ (Rep) 671 HC ***(dist)***

MBf Finance Bhd v. Alluwi Salleh & Anor [2002] 2 CLJ 133 HC ***(dist)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

TA Securities Sn Bhd v. Lim Tee Keong [2001] 1 LNS 122 HC ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC ***(refd)***

Tiun Eng Jin v. Wong Sie Kong [1975] 2 MLJ 34 ***(refd)***

UN Pandey v. Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 ***(refd)***

Wong Chong Chow v. Pan-Malaysian Cement Works Bhd [1980] 2 MLJ 75 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102

Hire-Purchase Act 1967, ss. 1(2), 2(1), 4C(c)(iii), (v), 16(6)

Other source(s) referred to:

Augustine Paul, *Evidence: Practice And Procedure,* 2nd edn 2000, p 704

For the plaintiff - Leong Ting Ting; M/s Tunku Amiruddin & KK Chew
For the defendants - Michael Tan Lip Yip; M/s Lee & Yong

Reported by M Maheswaran

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant plaintiff ("the plaintiff") against the decision of the learned magistrate who had on 8 June 2001 dismissed the plaintiff's amended claim for the balance sum of RM24,397.81 with costs.

Agreed Facts

At the hearing before the learned magistrate, certain facts were agreed by the parties. It was agreed that the plaintiff is a licensed finance company having its registered office in Kuala Lumpur. One of its branches is in Melaka, with which the first defendant had executed a hire purchase agreement No. 2-0401-74 1297-4D dated 13 January 1997 ("the agreement") wherein the plaintiff has agreed to finance the defendant in enabling the first defendant to hire and purchase a unit of Isuzu NHR 55E (SV) bearing registration number MAJ 682, engine number 310044 and chassis number JAANHR 55EP 7112329. The first defendant paid a sum of RM9,820.76 upon execution of the agreement towards the account of the purchase consideration of RM82,240.76 and the balance thereof was to be paid with effect from 15 February 1997 by way of 71 instalments at RM1,006 per month and a final instalment of RM994. The second defendant executed a guarantee on the same date to guarantee the aforesaid instalment payments by the plaintiff.

Evidence Before The Learned Magistrate

In addition to the aforesaid agreed facts, evidence was adduced for the plaintiff through SP1 ie, one Zulkifli bin Atan, a credit officer of the plaintiff since 4 May 1979. He had knowledge of the transaction between the plaintiff and the defendants. SP1 testified that the vehicle is a heavy vehicle which is not subject to the Hire-Purchase Act 1967 ("the Act"). After effecting payment of four instalments from February until May 1997, the first defendant defaulted from June until September 1997 which resulted in the plaintiff bringing the action against the defendants in the court below for the balance sum of RM24,397.81, after deducting all previous payments and the proceeds of sale realised after repossession thereof by the plaintiff.

The defendants elected not to give evidence but instead submitted that the plaintiff has failed to prove its case against the defendants, on the sole ground that the agreement is subject to the Act as the vehicle is a motor lorry prescribed in the First Schedule to the Act, in which case it was argued for the defendants that the plaintiff must comply with the mandatory provisions of s. 16(6) of the Act pertaining to the service of the notice in the Fifth Schedule thereto.

The defendants' submission on this ground was upheld by the learned magistrate who held that the plaintiff's evidence that the lorry was a heavy vehicle was not sufficient in the absence of evidence in support thereof.

Submission For Plaintiff

Cik Leong Ting Ting, learned counsel for the plaintiff, by way of written submission stressed in essence that the learned magistrate erred in holding that the burden of proving that the maximum permissible laden weight of the lorry exceeds 2540 kg. is on the plaintiff and also erred in concluding that the plaintiff has failed to discharge this burden.

Contention For Defendants

Learned counsel, the late En. Michael Tan Lip Yip, assisted by En. Yong Chen Lim, in their written submission filed prior thereto, contended for the defendants that the learned magistrate did not occasion any error of law or fact in dismissing the plaintiff's claim, adding that the parties are bound by their pleadings. It was stressed for the defendants that the parties have clearly intended the agreement to be subject to the Act as "the intitulement, formation and contents of the agreement were in conformity with all the requirements of PART II of the Act", citing *MBf Finance Bhd v. Alluwi bin Salleh & Anor* [2002] 2 CLJ 133 (HC) in support thereof.

Defendants' learned counsel also relied on *Kesang Leasing Sdn Bhd v. Mohd Yusof bin Ismail & Anor* [1989] 2 CLJ 1216; [1989] 1 CLJ (Rep) 671 (HC) in submitting that even if the item in the agreement ie, Isuzu lorry is not specifically within the First Schedule to the agreement, it does not prevent the parties from contracting within the Act.

It was finally argued for the defendants that the burden is on the plaintiff to prove that the lorry fell outside the First Schedule to the Act and that the agreement is outside the Act, adding that the doctrine of *contra proferentem* applied in favour of the defendants as hirers, in that any ambiguity or confusion over the weight of the lorry should be resolved in favour of the defendants.

Decision Of The Court

Authorities Cited For Defendants

Before I proceed to consider the question relating to burden of proof, I shall consider the authorities cited for the defendants.

In *MBf Finance Bhd v. Alluwi, supra*, the crux of the case concerns an application for enlargement of time to lodge a notice of appeal against the decision of the Sessions Court made in respect of an excavator which does not come within the list of goods in the First Schedule to the Act. In the course

of dealing with the merits of the appeal as a factor favouring the application, Jeffrey Tan J observed that "it does not mean, whenever the subject matter is not specified in the First Schedule, that parties can never contract under the Act", and that the intitulement of the agreement in that case referred to a hire purchase agreement, in which the formation and contents of the agreement were all in conformity with all the requirements of the Act, as a result of which his Lordship said that it was more than arguable that the agreement was a hire purhase agreement designed for use in respect of the goods specified in the First Schedule, but adopted and agreed by the parties to be used in respect of the purchase of the excavator, thereby concluding that there were merits in the appeal.

In my view, these observations made in the hearing of an application for enlargement of time to file a notice of appeal in which the applicant said nothing about the merits of the appeal (see p. 504) are actually *obiter dictum* which does not have any binding effect, as opposed to *ratio decidendi*. These observations would certainly have become *ratio decidendi* if they had been made in the course of hearing the appeal proper in which parties have ventilated their views thereon. In the circumstances, I am of the view that the decision is of little or no assistance to the defendants.

Quite apart from that, s. 4C of the Act prescribes the contents of a hire purchase agreement under the Act but a proper perusal of the agreement tendered before the learned magistrate shows that the agreement did not follow the contents of s. 4C(c)(iii) to (v) as these items pertaining to the amounts included in the freights, vehicle registration fees and insurance were not specified in the agreement. In the circumstances, it is clear that the parties hereto have agreed not to be bound by the provisions of the Act.

Kesang Leasing, supra, which was followed by Jeffrey Tan J in *MBf Finance Bhd v. Alluwi, supra,* concerned a hire purchase agreement for the hire of a unit of personal computer which at that time did not fall under the First Schedule to the Act. The plaintiff's action against the defendant brought under the Act was dismissed by the learned magistrate on the ground that the Act did not apply. In allowing the appeal, Eusoff Chin J (later CJ, Malaysia) held that the object and purpose of the Act are to regulate the form and contents of hire purchase agreements and the rights and duties of the parties thereto, and that s. 1(2) of the Act does not exclude the application of the provisions of the Act to hire purchase agreements in respect of goods not specified in the First Schedule if the parties have agreed to be bound by the provisions of the Act.

In my view, the facts in *Kesang Leasing, supra*, may be described as the reverse of the facts in this appeal, in that the action there was brought under the Act, while this action under appeal here was not brought under the Act. The essential issue in that case was that the parties have agreed to be bound by the provisions of the Act, while in this appeal, the defendants argued in favour of being bound by the provisions of the Act while the plaintiff contended that it was outside and not subject to the Act. Hence *Kesang Leasing, supra,* may be distinguished accordingly as the parties do not appear to have agreed by way of *consensus ad idem,* to be bound by the provisions of the Act.

Section 2(1) of the Act applies to agreements within its ambit but does not prohibit hire purchase agreements outside its ambit: *Arab Malaysian Credit Bhd v. Har Yoke Ling* [1998] 1 LNS 3 HC, cited in *MBf Finance Bhd v. Alluwi, supra*. *Arab Malaysian Credit Bhd, supra*, did not decide that an agreement outside the Act is also mandatorily governed by the Act.

Burden Of Proof

I shall now consider the crucial issue which arises in this appeal relating to the burden of proof.

On the basis of the plaintiff's amended pleading, the plaintiff's action is obviously not grounded on the provisions of the Act but instead based on common law principles. On this premise, and from SP1's evidence, the learned magistrate found that the plaintiff has adduced evidence that the lorry was a heavy vehicle which, the plaintiff submitted, is not subject to the Act and so it was not necessary to send any notice under the Fourth and Fifth Schedules.

Section 101 of the Evidence Act 1950 provides for burden of proof in the following words:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The phrase "burden of proof" has two distinct meanings, namely, the legal burden of establishing a case and the evidential burden of introducing evidence. Section 101 deals with the former while s. 102 of the same Act deals with the latter: see p. 704 *Evidence: Practice And Procedure*, 2nd edn, 2000 by Augustine Paul J. Section 102 of the same Act reads:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Applying s. 101 and s. 102 of the Evidence Act 1950, the legal burden of proof is on the plaintiff to establish that the lorry is not subject to the Act. The plaintiff sought to do this by adducing evidence that it is a lorry and a heavy vehicle and that it was not subject to the Act. There is therefore *prima facie* evidence that the lorry is a heavy vehicle not subject to the Act, but the defendants' counsel made no attempt whatsoever to cross-examine, although it has been pleaded by the defendants that the lorry and the agreement were subject to the Act.

In my view, the legal burden of proof on the plaintiff under s. 101 has *prima facie* been discharged on a balance of probabilities in this civil case in which event the evidential burden shifts to the other party ie, the defendants: *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147 HC; *U.N. Pandey v. Hotel Marco Polo Pte. Ltd.* [1980] 1 MLJ 4; *Wong Chong Chow v. Pan-Malaysian Cement Works Bhd.* [1980] 2 MLJ 75; *Johara Bi binte Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor.* [1981] 1 MLJ 139; and *International Times & Ors. v. Leong Ho Yuen* [1980] 2 MLJ 86.

The defendants can discharge the evidential burden by cross-examination of witnesses of the plaintiff ie, the party on whom the legal burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. ... If he does not adduce any evidence when the evidential burden has shifted to him, he will fail: *per* Augustine Paul JC (now J) in *Tan Kim Khuan, supra.*

In view of the fact that the defendants did not cross-examine SP1 on the evidence that the lorry as a heavy vehicle was not subject to the Act, and elected not to call witnesses or give evidence themselves, the defendants cannot be heard to raise this issue in argument. The importance of putting the defendants' case to his opponent's witness or witnesses has been explained in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639 CA by the Court of Appeal, when applying the rule in *Browne v. Dunn* [1893] 6 R67 HL, as follows:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

(See also *Sivalingam Periasamy v. Periasamy & Anor.* [1996] 4 CLJ 545, 551 CA; *Joremi Kimin & Anor v. Tan Sai Hong* [2001] 1 CLJ 526, 533 CA).

Further, illustration (b) in s. 102 of the Evidence Act 1950 clearly casts the evidential burden of proof on the defendants. It reads as follows:

> (b) A. sues B. for money due on a bond.
>
> The execution of the bond is admitted, but B. says that it was obtained by fraud, which A. denies.
>
> If no evidence were given on either side, A. would succeed as the bond is not disputed and the fraud is not proved.
>
> Therefore the burden of proof is on B.

In the hearing before the learned magistrate, and now the appeal before me, the plaintiff (A) is suing on the agreement, the execution of which was admitted by the defendants (B), but the defendants (B) said that it was subject to the Act, which (A) denied. In the above illustration, even if no evidence is given on either side, the plaintiff (A) would succeed as the agreement was not disputed. A *fortiori*, in this appeal, there was evidence that the lorry was a heavy vehicle not subject to the Act. The defendants to whom the evidential burden of proof has been shifted must introduce evidence that the heavy vehicle was subject to the Act, but the defendants have failed to do so.

In *TA Securities Sdn Bhd v. Lim Tee Keong* [2001] 1 LNS 221 HC, the plaintiff gave evidence pertaining to the defendant's opening of trading and margin accounts with the plaintiff for the purpose of buying and selling securities on the Kuala Lumpur Stock Exchange. PW2 was the remisier for the defendant. The plaintiff's claim against the defendant was based on the fact that the defendant had given instructions, on the telephone, to PW2 to purchase certain shares and that the defendant had failed to pay the purchase price for the shares. As a result thereof, the plaintiff had to force sell the shares and the losses suffered by the plaintiff was a sum of RM9.1m. The defendant denied giving any instructions to PW2 to purchase the shares and the parties agreed that the only issue for determination was whether or not the defendant had in fact placed an order for the shares through PW2. The defendant elected to give no evidence at all. Rekhraj J (as he then was) held that in such a case the court was deprived of hearing the defendant on his version of the story and of weighing the balance of probabilities. The plaintiff's evidence therefore remained unrebutted and judgment was given in favour of the plaintiff.

Similarly, in this appeal, the plaintiff's case also remained unrebutted as the defendants have failed to discharge the evidential burden of proof.

Most importantly, just before I delivered this judgment in this appeal, learned counsel Cik Leong for the plaintiff and En. Yong for the defendants have agreed that in the light of the registration card showing the maximum permissible laden weight of the said vehicle to be 4100kg. and therefore exceeding 2540kg. for goods vehicle listed in para 2(d) of the First Schedule to the Act, the lorry in this appeal is clearly outiside the ambit of the Act, in which case, the plaintiff was correct in saying that the Act does not apply to the agreement. In fairness to the learned magistrate, this critically decisive fact has not been agreed by the different set of learned counsel who appeared before the learned magistrate and had it been so agreed in the court below, I have absolutely no doubt whatsoever that her decision would have been different.

Contra Proferentem

This basic rule of construction means that where an ambiguity or doubt arises in the interpretation of a written document such as an agreement, that ambiguity or doubt would be resolved by construing the agreement against the person who drafted, prepared or put forward the agreement: (see eg, *Edis v. Bury* 108 ER 511 HC; *Tiun Eng Jin v. Wong Sie Kong* [1975] 2 MLJ 34, 38 (HC) C-D left).

In this appeal, I am unable to identify the part of the agreement which has suffered from an ambiguity or a doubt. One must not attribute an ambiguity or doubt to an agreement when in reality there was none. I do not find any force or merit in this submission and see no reason in upholding it.

Conclusion

On the foregoing grounds, I therefore allow this appeal, set aside the aforesaid order of the learned magistrate and give judgment in favour of the plaintiff in terms as prayed in the amended claim, with costs here and the court below.